

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD LEE GRUBER,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:06-CV-00655-ECR-(RAM)

ORDER

Before the Court are the First Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#30), Respondents' Answer (#49), and Petitioner's Reply (#56). The Court finds that Petitioner is not entitled to relief, and it denies the First Amended Petition (#30).

Pursuant to a plea agreement, Petitioner was convicted in the Eighth Judicial District Court of the State of Nevada of Count I, sexual assault with a minor under the age of 16, Count II, lewdness with a child under the age of 14, and Count III, attempted sexual assault with a minor under the age of 16. Petitioner's Ex. 9 (#31-9). The victim in first two counts was Petitioner's younger step-daughter, and the victim in the third count was Petitioner's older step-daughter. Petitioner filed a notice of appeal pro se. Respondents' Ex. 8 (#16-3, p. 22).¹ The Nevada Supreme Court dismissed the appeal as untimely. Respondents' Ex. 9 (#16-3, p. 24). Petitioner then filed a post-conviction habeas corpus petition in the state district court. Petitioner's Ex. 12 (#31-12). The

¹Page numbers in parentheses refer to the images of the documents in the Court's computer docket.

1 district court denied the petition. Petitioner's Ex. 16 (#31-16). Petitioner appealed, and the Nevada
 2 Supreme Court affirmed. Petitioner's Ex. 21 (#31-21). Petitioner then commenced this action.²

3 "A federal court may grant a state habeas petitioner relief for a claim that was
 4 adjudicated on the merits in state court only if that adjudication 'resulted in a decision that was
 5 contrary to, or involved an unreasonable application of, clearly established Federal law, as
 6 determined by the Supreme Court of the United States,'" Mitchell v. Esparza, 540 U.S. 12, 15
 7 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication "resulted in a decision
 8 that was based on an unreasonable determination of the facts in light of the evidence presented in
 9 the State court proceeding," 28 U.S.C. § 2254(d)(2).

10 A state court's decision is "contrary to" our clearly established law if it "applies a
 11 rule that contradicts the governing law set forth in our cases" or if it "confronts a set
 12 of facts that are materially indistinguishable from a decision of this Court and
 13 nevertheless arrives at a result different from our precedent." A state court's decision
 14 is not "contrary to . . . clearly established Federal law" simply because the court did
 not cite our opinions. We have held that a state court need not even be aware of our
 precedents, "so long as neither the reasoning nor the result of the state-court decision
 contradicts them."

15 Id. at 15-16. "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court
 16 may not issue the writ simply because that court concludes in its independent judgment that the
 17 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
 18 Rather, that application must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76
 19 (2003) (internal quotations omitted).

20 [T]he range of reasonable judgment can depend in part on the nature of the relevant
 21 rule. If a legal rule is specific, the range may be narrow. Applications of the rule
 22 may be plainly correct or incorrect. Other rules are more general, and their meaning
 23 must emerge in application over the course of time. Applying a general standard to
 24 a specific case can demand a substantial element of judgment. As a result,
 evaluating whether a rule application was unreasonable requires considering the
 rule's specificity. The more general the rule, the more leeway courts have in
 reaching outcomes in case-by-case determinations.

25 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

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 27 ²Petitioner has filed other post-conviction petitions and motions in state court after the
 28 conclusion of his first habeas corpus petition, but they do not affect the Court's analysis of the
 grounds that he presents in his First Amended Petition (#30).

1 The petitioner bears the burden of proving by a preponderance of the evidence that he
2 is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

3 In Ground 1, Petitioner claims that his plea was not entered knowingly, intelligently,
4 and voluntarily because he was taking psychiatric medication at the time of the plea. He further
5 alleges that even though the court and his counsel knew of his mental illness, there was no hearing
6 to determine his competence. Ground 1 contains two separate legal issues: Whether Petitioner was
7 competent to stand trial, and whether Petitioner's waiver of his rights was knowing and voluntary.
8 The test of competence is "whether a criminal defendant 'has sufficient present ability to consult
9 with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as
10 well as factual understanding of the proceedings against him.'" Drope v. Missouri, 420 U.S. 162,
11 172 (1975) (citing Dusky v. United States, 362 U.S. 402 (1960)). For a guilty plea to be knowing
12 and voluntary, the defendant must be fully aware of the direct consequences of the plea. Brady v.
13 United States, 397 U.S. 742, 755 (1970).

14 A finding that a defendant is competent to stand trial, however, is not all that is
15 necessary before he may be permitted to plead guilty or waive his right to counsel. In
16 addition to determining that a defendant who seeks to plead guilty or waive counsel
17 is competent, a trial court must satisfy itself that the waiver of his constitutional
rights is knowing and voluntary. . . . In this sense there is a "heightened" standard
for pleading guilty and for waiving the right to counsel, but it is not a heightened
standard of competence.

18 [Footnote 12:] The focus of a competency inquiry is the defendant's mental
19 capacity; the question is whether he has the ability to understand the
proceedings. . . .

20 The purpose of the "knowing and voluntary" inquiry, by contrast, is to
21 determine whether the defendant actually does understand the significance
22 and consequences of a particular decision and whether the decision is
uncoerced.

23 Godinez v. Moran, 509 U.S. 389, 400-01 & n.12 (1993) (citations omitted). On the matter of
24 competence, the Nevada Supreme Court stated the correct test: "[W]hether the defendant has
25 sufficient present ability to consult with his lawyer with a reasonable degree of rational
26 understanding and if he has a rational and factual understanding of the proceedings." Petitioner's
27 Ex. 21, p. 3 (#31-22, p. 4). See Drope, 420 U.S. at 172. The Nevada Supreme Court then held:
28

1 The district court conducted an extensive plea canvass, and appellant responded
2 appropriately to all of the court's questions. Appellant stated at the canvass that he
3 had received medicine every day for his psychological illness since being
4 incarcerated. The plea agreement stated that appellant was not under the influence of
5 any controlled substances or drugs which impaired his ability to comprehend or
6 understand the plea agreement and proceedings surrounding his plea, and appellant
7 stated during his canvass that he had read, understood, and signed the plea
8 agreement. The record supports the district court's conclusion that appellant
9 understood the proceedings and was able to consult with his counsel. Thus, the
10 district court did not err in denying this claim.

11 Petitioner's Ex. 21, p. 3 (#31-21, p. 4). The question is not whether Petitioner had a mental
12 illness—the evidence indicates that he has a paranoid personality disorder—but whether he met the
13 Drope standard for competence. Everything in the transcripts indicates that he was on anti-
14 psychotic medication at the time of the criminal court proceedings, that he was able to consult with
15 his lawyer, and that he understood those proceedings. Nothing in the transcripts indicates that he
16 was behaving or speaking bizarrely, such that reasonable counsel would ask for a hearing on his
17 competence, or that the court would order on its own motion a hearing on his competence.³ To that
18 extent, the Nevada Supreme Court's decision was a reasonable application of Moran and Drope.

19 Furthermore, the record indicates that Petitioner's plea was knowing and voluntary.
20 He understood that the judge was not bound by the negotiations on the sentence, that if the judge
21 accepted the negotiations then he would serve the sentences for Counts I and II consecutively, with
22 the parties free to argue whether the sentence for Count III would be consecutive to or concurrent
23 with the sentences on Counts I and II, and that he would be subject to supervision and registration as
24 a sex offender for the rest of his life. He understood the charges, he understood what rights he had
25 and was waiving, and he admitted that he committed the crimes charged. Respondents' Ex. 6 (#16-
26 3, p. 1). Petitioner's plea was knowing and voluntary.

27 Reasonable jurists might find the Court's conclusions to be debatable, and the Court
28 grants a certificate of appealability on this ground.

29 ³Petitioner notes that he reported hallucinations and hearing voices to jail medical personnel.
30 First Amended Petition, p. 8 (#30). Those reports occurred a month after he pleaded guilty, and thus
31 could not have informed the court or counsel at the plea hearing.

1 The Court dismissed Ground 2 as procedurally barred. Order (#48). The Court
2 noted that the Nevada Supreme Court was clear when it dismissed, pursuant to Nev. Rev. Stat.
3 § 34.810, all claims in the state habeas corpus petition that did not raise ineffective assistance of
4 counsel. The Court also noted that the Court of Appeals for the Ninth Circuit has held that § 34.810
5 is an adequate and independent state-law reason for denying relief. Order, p. 3 (#48). Reasonable
6 jurists would not disagree with these conclusions, and the Court will not grant a certificate of
7 appealability on this ground.

8 Grounds 3 and 4 are claims of ineffective assistance of counsel. “[T]he right to
9 counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759,
10 771 & n.14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1)
11 that the defense attorney’s representation “fell below an objective standard of reasonableness,”
12 Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney’s deficient
13 performance prejudiced the defendant such that “there is a reasonable probability that, but for
14 counsel’s unprofessional errors, the result of the proceeding would have been different,” id. at 694.
15 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in
16 the same order or even to address both components of the inquiry if the defendant makes an
17 insufficient showing on one.” Id. at 697.

18 Strickland expressly declines to articulate specific guidelines for attorney
19 performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of
20 interest, the duty to advocate the defendant’s cause, and the duty to communicate with the client
21 over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel’s
22 duties so exhaustively as to give rise to a “checklist for judicial evaluation of attorney
23 performance. . . . Any such set of rules would interfere with the constitutionally protected
24 independence of counsel and restrict the wide latitude counsel must have in making tactical
25 decisions.” Id. at 688-89.

26 Review of an attorney’s performance must be “highly deferential,” and must adopt
27 counsel’s perspective at the time of the challenged conduct to avoid the “distorting effects of
28 hindsight.” Strickland, 466 U.S. at 689. A reviewing court must “indulge a strong presumption that

1 counsel's conduct falls within the wide range of reasonable professional assistance; that is, the
2 defendant must overcome the presumption that, under the circumstances, the challenged action
3 'might be considered sound trial strategy.'" Id. (citation omitted).

4 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
5 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.
6 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
7 below an objective standard of reasonableness alone is insufficient to warrant a finding of
8 ineffective assistance. The petitioner must also show that the attorney's sub-par performance
9 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,
10 but for the attorney's challenged conduct, the result of the proceeding in question would have been
11 different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence
12 in the outcome." Id.

13 If a state court applies the principles of Strickland to a claim of ineffective assistance
14 of counsel in a proceeding before that court, the petitioner must show that the state court applied
15 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.
16 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

17 Ground 3 contains three separate claims of ineffective assistance. In Ground 3(a),
18 Petitioner alleges that counsel failed to investigate Petitioner's mental health history, to inform the
19 Court that Petitioner was incompetent to enter a plea of guilty, and to request a competency hearing.
20 Petitioner also alleges that counsel allowed Petitioner to enter a plea despite his inability to
21 comprehend the proceedings. Ground 1 is the underlying claim regarding competence and the
22 validity of the guilty plea, and the Court has already determined that Ground 1 is without merit.
23 Consequently, Ground 3(a) is without merit.

24 As with Ground 1, reasonable jurists might debate the Court's conclusion, and the
25 Court grants a certificate of appealability on this issue.

26 In Ground 3(b), Petitioner alleges that counsel failed to file a motion to suppress
27 Petitioner's statement to police. He argues that he was not competent at the time of the statement,
28 and thus the statement was not voluntary; if counsel had moved to suppress the statement instead of

1 advising Petitioner that it would be admitted against him, then Petitioner would not have pleaded
2 guilty. On this issue, the Nevada Supreme Court held:

3 Second, appellant claimed that counsel was ineffective for failing to move the court
4 to suppress his statement to detectives because there was never a reading of his
5 Miranda rights on the record and the detectives withheld medication from him.
6 Appellant failed to demonstrate that counsel's performance was ineffective, or that,
7 but for counsel's performance, appellant would have refused to plead guilty and
8 would have proceeded to trial. Per appellant's arrest report, appellant was read his
9 Miranda rights, stated that he understood them, and wished to talk to detectives about
10 the alleged sexual abuse. There was no evidence on the record that appellant was
11 deprived of medication during interrogation. Furthermore, appellant had negotiated
his plea bargain prior to waiving his preliminary hearing, so counsel did not have the
opportunity to file a motion to suppress. Appellant benefited [sic] from pleading
guilty because he avoided additional charges and a potential greater maximum
sentence. The first amended complaint listed eight counts of sexual assault of a
minor under the age of sixteen, twelve counts of lewdness with a child under the age
of fourteen, and four counts of open and gross lewdness. Thus, the district court did
not err in denying this claim.

12 Petitioner's Ex. 21, pp. 3-4 (#31-21, pp. 4-5) (emphasis added) (citing Miranda v. Arizona, 384 U.S.
13 436 (1966)). Petitioner no longer claims that the off-record Miranda warnings were invalid. The
14 rest of the Nevada Supreme Court's holding shows a disagreement with Petitioner over cause and
15 effect. Petitioner argues that if counsel had moved to suppress the statement to police, assuming
16 that the motion would be successful, then he would not have pleaded guilty. The Nevada Supreme
17 Court held that counsel could not have moved to suppress the statement to police because Petitioner
18 decided to plead guilty before counsel had the opportunity to move to suppress the statement. See
19 Petitioner's Ex. 4 (#31-4) (waiver of preliminary hearing due to plea agreement). Other evidence in
20 the record shows the reasonableness of the Nevada Supreme Court's holding. Petitioner's statement
21 to the police was not his only admission of the crime. In the declaration of arrest, Detective
22 Chandler of the Las Vegas Metropolitan Police Department stated that he listened in to a telephone
23 conversation between Petitioner and his older step-daughter; Petitioner admitted that he had
24 committed the sexual acts upon both of his step-daughters. Respondents' Ex. 1 (#16-1, p. 1). That
25 statement was admissible through the testimony of the detective, through the testimony of the step-
26 daughter, or through any recording made of the conversation. See Nev. Rev. Stat. § 51.035(3)(a)
27 (statement of party-opponent not hearsay). If counsel had succeeded in suppressing Petitioner's
28 statement to police, then his statement in the phone conversation still would have been admitted.

1 Success in the motion to suppress would have had two possible outcomes. First, it could have been
2 an empty victory. Petitioner might have realized that enough incriminating evidence still remained
3 and accepted the plea bargain, if it was still offered. Second, it could have been a Pyrrhic victory.
4 The prosecution might have offered a much less favorable plea bargain, or Petitioner might have
5 gone to trial and, given his own admissions, have been convicted of far worse charges than those to
6 which he has pleaded guilty. Petitioner suffered no prejudice from the lack of a motion to suppress
7 his statement to police. Furthermore, given that counsel was aware of the declaration of arrest, her
8 advice to plead guilty and not to pursue a motion to suppress was not deficient performance. The
9 Nevada Supreme Court reasonably applied Strickland. 28 U.S.C. § 2254(d)(1).

10 Reasonable jurists might find this conclusion debatable, and the Court grants a
11 certificate of appealability on this issue.

12 In Ground 3(c), Petitioner alleges that counsel had Petitioner plead guilty to a
13 charge—attempted sexual assault upon his older step-daughter—that the plea agreement stated
14 would not be pursued and which was time-barred. On this issue, the Nevada Supreme Court ruled:

15 Last, appellant claimed that counsel was ineffective for failing to object to him
16 pleading guilty to the attempted sexual assault, because the State had negotiated the
17 plea agreement to only contain the sexual assault and the lewdness counts. This
18 claim is not supported by the record. At the waiver of the preliminary hearing, the
19 State read into the record the plea as negotiated, including a count of attempted
20 sexual assault. The plea agreement specified what counts appellant was pleading
21 guilty to, including a count of attempted sexual assault. At the plea canvass,
22 appellant stated that he had read and understood the plea agreement, that he
23 understood the charges against him, and that he was pleading voluntarily. Appellant
24 specifically admitted during his plea canvass that he committed the attempted sexual
25 assault. Appellant failed to demonstrate that counsel was ineffective. Thus, the
26 district court did not err in denying this claim.

27 Petitioner's Ex. 21, pp. 4-5 (#31-21, pp. 5-6). Two paragraphs after noting that Petitioner would
28 plead guilty in Count III to attempted sexual assault upon his older step-daughter, the agreement
states that the prosecution would not pursue charges of sexual assault upon Petitioner's older step-
daughter. Respondents' Ex. 5, pp. 1-2 (#16-2, pp. 6-7). At worst, this was clumsy drafting. As the
Nevada Supreme Court noted, at the waiver of the preliminary hearing, the prosecution explained
that Petitioner would plead guilty to one count regarding his older step-daughter in exchange for the
prosecution not filing another case regarding her. Petitioner and his counsel agreed with that

1 explanation. Respondents' Ex. 3, pp. 3-4 (#16-1, pp. 14-15). At the plea hearing, the prosecution
2 noted that Petitioner was waiving all defects in the timeliness of Count III in exchange for the
3 prosecution not filing other charges regarding his older step-daughter. Respondents' Ex. 6, p. 6
4 (#16-3, p. 7). Finally, at sentencing Petitioner's counsel explained:

5 Your Honor, perhaps I can explain what happened. Originally this was a case filed
6 against one particular victim. There was another victim that something had
7 happened to that was an older case. And basically the State, in investigating the case
8 on Victim No. 1, said we're going to open a second case on Victim No. 2.

9 This obviously became the point of negotiations and why we ultimately negotiated
10 the case where Mr. Gruber is admitting to acts against both victims. But part of that
11 would have involved this Second Criminal Complaint being filed. And in
12 contemplation of that being filed we negotiated the case with the understanding that
13 if he did not negotiate, the State was going to go ahead and file the Second Amended
14 Criminal Complaint.

15 And we know that they didn't actually intend to do so at that time, with the idea that
16 if he backed out of his negotiation, then that Second Amended Criminal Complaint
17 would then become the charges in the case. And that was the basis for his actually
18 agreeing to plead to the count involving [his older step-daughter]. That wasn't part
19 of the original charges.

20 Petitioner's Ex. 8, pp. 4-5 (#31-8, pp. 3-4). Petitioner's older step-daughter had reported
21 Petitioner's sexual assaults upon her soon after they happened. The statute of limitation did not
22 apply to those charges. Nev. Rev. Stat. § 171.083. For a charge of attempted sexual assault upon
23 his older step-daughter, the period of limitation probably had run out. See Nev. Rev. Stat.
24 § 171.085. In exchange for agreeing to plead guilty to an otherwise untimely count of attempted
25 sexual assault, Petitioner was not charged with counts of sexual assault upon his older step-
26 daughter. The written plea agreement did not convey that bargain well, but comments by the
27 attorneys explained what was really happening. Furthermore, counsel did have a good reason for
28 not objecting to the otherwise untimely count. If counsel did object, then the result would not have
been an agreement to plead guilty to the remaining Counts I and II. Instead, the result would have
been the collapse of plea negotiations. The second amended criminal complaint shows that
Petitioner then would have faced 8 counts of sexual assault upon a minor under 16 years of age, 12
counts of lewdness with a child under the age of 14, and 4 counts of open or gross lewdness, all
involving Petitioner's younger step-daughter. Petitioner's Ex. 3 (#31-3). Because the prosecution
did not file another case against Petitioner, involving his older step-daughter, the Court does not

1 know how many additional counts of sexual assault he faced, but it was at least one count.

2 Petitioner never faced those charges because he agreed to plead guilty. Under those circumstances,
3 the Nevada Supreme Court reasonably applied Strickland. 28 U.S.C. § 2254(d)(1).

4 Reasonable jurists might find this conclusion to be debatable, and the Court grants a
5 certificate of appealability on this issue.

6 In Ground 4, Petitioner argues that counsel should have obtained Petitioner's mental
7 health records to try to mitigate his sentence. As noted above, the parties negotiated the sentences;
8 the sentences for Counts I and II were to be served consecutively, and the parties retained the right
9 to argue whether the sentence for Count III was to be served consecutively or concurrently.

10 Petitioner notes that at sentencing counsel's primary argument was that Petitioner's mental illness
11 should mitigate the sentence, but that counsel did not obtain the records that could show his lengthy
12 history of mental illness. At sentencing, counsel repeatedly noted that Petitioner has suffered from
13 schizophrenia, a severe mental illness, since at least the age of 23, and Petitioner was 39 at the time
14 of sentencing. Petitioner's Ex. 8, pp. 17-20, 23-24 (#31-8, pp. 7, 8). The Court has reviewed the
15 sealed mental health records. They reinforce what counsel argued at sentencing, but they add
16 nothing new. Furthermore, there is no sign that the sentencing court did not believe counsel; to the
17 contrary, that court knew from early in the proceedings that Petitioner was on psychiatric
18 medications for his schizophrenia. Petitioner has not shown how placing the mental health records
19 into evidence could have resulted in the judge directing that Count III run concurrently.

20 Reasonable jurists might debate this conclusion, and the Court grants a certificate of
21 appealability on this issue.

22 IT IS THEREFORE ORDERED that the First Amended Petition for Writ of Habeas
23 Corpus Pursuant to 28 U.S.C. § 2254 (#30) is **DENIED**. The Clerk of the Court shall enter
24 judgment accordingly.

25 IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** on the
26 following issues:

- 27 1. Whether the Court was correct in ruling that the Nevada Supreme Court
28 reasonably applied clearly established federal law in its holding that Petitioner was
competent to enter his plea, and that his plea was knowing and voluntary;

1 2. Whether the Court was correct in ruling that counsel was not ineffective
2 regarding the investigation of Petitioner's mental health history, and for not
3 requesting the trial court to hold a competency hearing;

4 3. Whether the Court was correct in ruling that the Nevada Supreme Court
5 reasonably applied clearly established federal law in its holding that the lack of a
6 motion to suppress Petitioner's statement to police was not ineffective assistance of
7 counsel;

8 4. Whether the Court was correct in ruling that the Nevada Supreme Court
9 reasonably applied clearly established federal law in its holding that the lack of
10 objection to the attempted sexual assault charge in Count III was not ineffective
11 assistance of counsel; and

12 5. Whether the Court was correct in ruling that counsel was not ineffective
13 regarding counsel's investigation of Petitioner's mental health history and
14 presentation of that history as evidence to mitigate his sentence.

15 DATED: March 5, 2010

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EDWARD C. REED
United States District Judge